No. 11814

In the United States Circuit Court of Appeals
for the Ninth Circuit

T. J. BRANDON, JR., with alias THOMAS JEFFERSON, WILL KEY JEFFERSON, Appellant

vs.

UNITED STATES OF AMERICA, Appellee

ON APPEAL FROM THE DISTRICT COURT FOR THE TERRITORY OF ALASKA, THIRD DIVISION

BRIEF FOR THE APPELLEE

RAYMOND E. PLUMMER,
United States Attorney,
Anchorage, Alaska
Attorney for Appellee.

SUBJECT INDEX

TABLE OF AUTHORITIES

Cases:

In the United States Circuit Court of Appeals for the Ninth Circuit

---

No. 11814

T. J. BRANDON, JR., with alias THOMAS JEFFERSON, WILL KEY JEFFERSON, Appellant

vs.

UNITED STATES OF AMERICA, Appellee

BRIEF FOR THE APPELLEE

JURISDICTIONAL STATEMENT

The statement of jurisdiction is properly set forth in Appellant's opening Brief (p. 1).

STATEMENT OF FACTS

The indictment in this case was returned against the defendant-appellant as Will Key Jefferson. However, at the trial he stated that his true name was T. J. Brandon, Jr.; that he had also used the name Thomas Jefferson; and that he was known in Anchorage as Will Key Jefferson (R. 240-241, 273-274). In this brief the appellant will be referred to as Will Key Jefferson.

During February of 1945, Fred Lange, a former resident of Paducah, Kentucky, lived at the Deeleventh Apartments in Anchorage (R 58, 254, 256, 258). These apartments were at that time owned by Will Key Jefferson, and were still in the process of construction. As stated in Appellant's Brief, at page 2, Jefferson was short of money. He was delinquent with his accounts at the Northern Commercial Company (R. 78, 79), and the record reflects that shortly thereafter his financial condition was such that he was unable to pay a hospital bill of between thirty and forty dollars (R. 312).

During the first part of February, 1945, Jefferson had inquired of Fred Lange the names of banks in Paducah, Kentucky (R 58). Fred Lange advised Jefferson that there were two banks located there, the Peoples National Bank of Paducah and the Citizens Savings Bank of Paducah (R. 58). Jefferson confirmed the fact that the Peoples National Bank of Paducah, Kentucky, existed, through Mr. George Mumford of the Bank of Alaska at Anchorage, Alaska (R. 253, 254).

On approximately February 10, 1945, Jefferson cashed a check (Plaintiff's Exhibit No. 1) drawn on the Peoples National Bank of Paducah, Kentucky, payable to the Deeleventh Apartments of Anchorage, Alaska, in the amount of $496.80, signed by Wosdon P. Lang, at the Northern Commercial Company in Anchorage (R. 60). When this check was cashed by Henry Cole, Credit Manager of the Northern Commercial Company, the sum of $50.00 was applied to one of Jefferson's accounts; $85.00 to another account; and he re-

ceived the balance of $361.80 in cash (R. 61). The signature "Wosdon P. Lang" on this check was forged by the appellant in this action, Will Key Jefferson (R. 135, 163, 164, 193).

On or about March 7th or 8th, 1945, Jefferson claimed to have received a letter from Nancy Lang (Defendant's Exhibit "I") which in substance advised him that the check would be dishonored (R. 248, 249).

On March 6, 1945, the check was mailed to the Anchorage office of the Northern Commercial Company by the Seattle office (R. 386). As soon as this check was returned to Anchorage with the notation "Protested for non-payment this February 27, 1945, Marie E. Roth, Notary Public", Jefferson was so notified (R. 65). He at that time made no effort to make good the check (R. 66, 71). For this reason the check was subsequently referred to W. N. Cuddy, attorney for the Northern Commercial Company, for the purpose of collection (R. 375). After efforts to collect the check from Jefferson had failed and it was discovered that certain irregularities existed, the check was referred to the United States Attorney for investigation (R. 375). The check was personally delivered to the Assistant United States Attorney by Mr. Cuddy and Mr. Cole on May 16, 1945 (R. 74, 75, 78, 354). It was not until the check had been turned over to the office of the United States Attorney and an investigation had been commenced that Jefferson made an effort to get back the check (R. 74, 75, 381). The check remained in the custody of the United States Attorney from May 16, 1945, to June 20,

1945, when it was returned to Mr. Cole by the Assistant United States Attorney who at that time understood that the check was to be paid (R. 354).

During the period from May 16 to June 20, 1945, when the check was in the possession of the United States Attorney's office, Jefferson made several frantic efforts to get the check back into his possession (R. 311, 312, 319, 341-343, 209). On several occasions he declined to make the check good unless the check itself was redelivered to him.

On June 12, 1945, Jefferson borrowed sufficient money to pay off the check and to pay another bill which he owed, from a finance company operated by Andrew Hassman (R. 280, 311, 312). During May or June of 1945, Jefferson sought the assistance of Attorney Harold Butcher in securing the return of the check (R. 319). He also sought the assistance of Attorney Stanley J. McCutcheon in recovering the check (R. 341-343). Although at the time of the trial McCutcheon had no recollection as to the date he endeavored to secure the return of the check he admitted that it could have been between May 16 and June 20, 1945 (R. 343).

It is apparent from the record that Jefferson's financial condition was such that the only time he had sufficient funds in his possession to make good the check was subsequent to June 12, 1945, the date that he had obtained a loan from the finance company (R. 280, 311, 312). Incidentally, all his efforts to get the check

back into his possession were made at or about that date (R. 280-285) and were made during the time the check was in the custody of the United States Attorney (R. 311, 312, 354).

The check in question was typed on an Underwood Standard Typewriter, Serial No. 4236469, which was rented by Jefferson from the Townsend Typewriter Shop from December 14, 1944, to September 28, 1946 (R. 127-128, 139-140, 244-245).

During February of 1945, Jefferson was employed to put in some shelving at the Townsend Typewriter Shop (R. 92). He had a key to the premises which he retained until February 16, 1945 (R. 282-284). On the top of a filing cabinet located in the Townsend Typewriter Shop during February, 1945, there was an F & E check protector, serial No. 2758148 (R. 90-91). The check protector impression on plaintiff's exhibit No. 1, the check cashed at the Northern Commercial Company on February 10, 1945, by Jefferson, was made on this check protector (R. 138-139). Although the check was returned to Mr. Cole of the Northern Commercial Company on June 20, 1945, by the Assistant United States Attorney with the understanding that the same was to be paid (R. 354), this was not done, and on October 9, 1945, the check was turned over to the Federal Bureau of Investigation (R. 206). The check had not been paid on December 31, 1945, when Mr. Cole left the employment of the Northern Commercial Company (R. 66, 67), and from the record it is apparent that the Northern Commercial Company had not been reimbursed at the time of the trial.

ARGUMENT

FIRST POINT RAISED: 1. THE TRIAL COURT DID NOT ERR IN REFUSING TO SET ASIDE THE INDICTMENT AS NOT SUFFICIENT UNDER THE STATUTE.

The pertinent provision of section 4856 Compiled Laws of Alaska 1933, under which this indictment was drawn, reads as follows:

> If any person shall, with intent to injure or defraud anyone, falsely make * * * forge, counterfeit * * *, or check * * *; or shall with such intent, knowingly utter and publish as true and genuine any such false * * * forged, counterfeited * * * instrument * * *, such person upon conviction thereof shall be punished by imprisonment in the penitentiary not less than two nor more than twenty years.

Section 4861 Compiled Laws of Alaska 1933 reads as follows:

> In any case where the intent to injure or defraud is necessary, by the provisions of this chapter, to constitute the crime, it shall be sufficient to allege in the indictment therefor an intent to injure or defraud without naming therein the particular person or body corporate intended to be injured or defrauded, and on the trial of the action it shall not be deemed a variance, but be deemed sufficient, if there appear to be an intent to injure or defraud the United States, or any State, Territory, county, town, or other municipal or

public corporation, or any public officer in his official capacity, or any private corporation, co-partnership, or member thereof, or any particular person or persons.

Ordinarily an indictment based on a statute is sufficient if it follows the wording of the statute or of the statutory form. The present indictment substantially follows the language of Section 4856 Compiled Laws of Alaska 1933, and also substantially follows the wording of the statutory form for forgery indictment set forth under paragraph "O" of Section 5210 Compiled Laws of Alaska 1933, which reads as follows:

> Sec. 5210. Manner of stating act constituting the crime. The manner of stating the act constituting the crime, as set forth hereinafter, is sufficient in all cases where the forms there given are applicable, and in other cases forms may be used as nearly similar as the nature of the case will permit.
> * * *
>
> O.—In an indictment for forgery.
>
> Forged (or falsely made, altered, or counterfeited, or as the case may be) an instrument purporting to be (or being) the last will and testament of C D, devising certain property with intent to defraud or injure.

A brief history of Sections 4856 and 4861 Compiled Laws of Alaska 1933 reflects that the same were adopted as a part of the penal code for the Territory of Alaska by Act of Congress March 3, 1899, 30 Stat-

utes at Large 1263-1266. These provisions were taken from the laws of Oregon, October 19, 1864, and are presently embodied in the Oregon Compiled Laws, Volume 3, Penal Code as Sections 23-560 and 23-568. With this legislative history in mind it would appear that the decisions by the Supreme Court of Oregon should be given controlling effect.

The Supreme Court of Oregon has held that an indictment is sufficient where it alleges an intent to injure or defraud without naming therein the particular person intended to be injured or defrauded.

> **State v. McElvain,** 35 Or. 365; 58 P. 525
> **State v. Frasier,** 95 Or. 90; 180 P. 520
> **Mas v. United States,** USCA DC, 151 F 2d 32
> **Bullington v. State,** 123 Nebr. 432; 243 N.W. 273

Count 1 of the indictment alleges in part, "did then and there knowingly, wilfully * * * **with intent to injure and defraud,** falsely make, forge and counterfeit a check for the payment of money on the Peoples National Bank of Paducah, Kentucky, * * *" (emphasis supplied). This general allegation of intent to defraud is sufficient.

Appellant contends that in the second count of the indictment there is a failure to allege that appellant knew the check was a forgery when he passed it. This contention is without basis.

Count 11 of the Indictment (R. 3-4) charges that the defendant had in his possession a check with a false,

forged and counterfeit signature written on the face thereof and that he "did with intent to injure and defraud, **wilfully,** feloniously, **knowingly** and unlawfully utter and publish as true and genuine to one Henry Cole", etc.

In Instruction 3 the Court correctly defined the words wilfully, feloniously, and unlawfully (R. 8) as follows:

> As used in the indictment in this case, the word "wilfully" means knowingly, intentionally and designedly.
> The word "feloniously" means with criminal intent and evil purpose.
> The word "unlawfully" means wrongfully or contrary to law.

In Instruction 3-A (R. 8) the Court correctly defines the word knowingly as follows:

> "Knowingly" means with knowledge. In cases such as this it implies not only knowledge but bad purpose and evil intent.

When one considers the allegations contained in Count II of the Indictment and the meaning of the words wilfully, feloniously and knowingly, it is apparent that the indictment sufficiently alleges that appellant knew that the check was a forgery when he passed it.

That the Court correctly defined wilfully and knowingly is reflected by the following cases.

In **Wilton v. U. S.** 9 Cir. 156 F 2d, 433, 434, this

Court approved the following instruction on the subject of wilfulness:

> You will note that it is charged in the information that the acts alleged to be done were done knowingly and wilfully. Doing or omitting to do a thing knowingly and wilfully implies not only a knowledge of the thing, but a determination with a bad intent to do it or to omit doing it. When used in a criminal statute it generally means an act done with a bad purpose. The word is also employed to make a thing done without ground for believing it is lawful or conduct marked by careless disregard whether or not one has a right to so act.

See also:

Screws v. U. S., 325 U. S. 101
Spies v. U. S., 317 U. S. 492, 497
U. S. v. Murdock, 290 U. S. 389, 394
Zimberg v. U. S., 1 Cir., 142 F. 2d 132, 137

SECOND POINT RAISED: 2. THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION TO STRIKE THE TESTIMONY OF THE WITNESS APPEL, ON THE GROUNDS THAT IT WAS BASED ON THE EXAMINATION OF DOCUMENTS NOT INTRODUCED IN EVIDENCE.

Section 4014, Compiled Laws of Alaska, 1933, reads as follows:

> In any proceeding before a court or judicial offi-

cer of the Territory of Alaska where the genuineness of the handwriting may be involved, any admitted or proved handwriting of such person shall be competent evidence as a basis for comparison by witness or by the jury, court or officer conducting such proceeding, to prove or disprove such genuineness.

Plaintiff's Exhibit No. 1 (R. 60, 61) is the questioned document in this case. During the trial the court admitted in evidence the following exhibits bearing the proven handwriting of Will Key Jefferson:

(1) Plaintiff's Exhibit No. 6, the same being an accident report dated January 27, 1945, made out and signed by Jefferson (R. 97, 18).

(2) Plaintiff's Exhibit No. 7, the same being an accident report dated October 17, 1945, made out and signed by Jefferson (R. 98).

(3) Plaintiff's Exhibit No. 8, the same being two yellow sheets of handwriting specimens given to the Federal Bureau of Investigation by Jefferson on February 18, 1946 (R. 103).

At page 135 of the Transcript of Record we find the following testimony by the witness Appel:

Q. Then from your examination, study and comparison of Plaintiff's Exhibit No. 1, 6, 7, and 8 do you have an opinion as to whether the writing and signature appearing on Plaintiff's Exhibit No. 1 and the other exhibits which you have were made by one and the same person?

A. Yes, I do.

Q. And in your opinion, Mr. Appel, who made the signatures appearing on all of those documents?

A. I came to the conclusion that the signature "Will Key Jefferson" and the signature "Wosdon P. Lang" on the check, Government's Exhibit 1, were written by the writer of these other exhibits, 6, 7, 8.

Q. And calling your particular attention to the signature, "Wosdon P. Lang", which appears as maker on Plaintiff's Exhibit No. 1, will you state who, in your opinion, affixed that signature to the check? As to Plaintiff's Exhibit 1?

A. Will Key Jefferson, the writer of these ~~just a minute—Plaintiff's Exhibit 6, 7,~~ known exhibits 6, 7 and 8.

And at page 164:

Q. In your examination, Mr. Appel—in your examination, then, you have concluded that the signature "Wosdon P. Lang", appearing on Plaintiff's Exhibit No. 1 was written by the same person who executed the writing on Plaintiff's Exhibit No. 3—just a minute—Plainltiff's Exhibit 6, 7 and 8?

A. Yes.

It is apparent from the record that Appel's conclusion was based upon an examination, study and comparison of the questioned document with Exhibits 6,

7 and 8 which were proved writings of Jefferson and admitted into evidence as standards of comparison.

Appellant contends that inasmuch as it appears that other writings, not introduced in evidence, were used by the witness Appel that the trial court should have stricken his entire testimony. Appellant in support of his contention cites Osborn: "Questions Document Problems", p. 117; Thompson v. Freeman, 111 Fla. 433, 149 So. 740; and In re Iwers Estate, 225 Iowa 389, 280 N. W. 579.

There is no testimony in the record to indicate that the other writings used by Appel, "confirmed and strengthened" his opinion. To the contrary, Appel, specifically testified to the contrary, as follows:

> Q. And those standards that aren't in evidence —do they confirm your opinion that you have from the things that are in evidence?
>
> A. They don't add anything to it. (R. 184).

The facts of the present case are not such that it can be brought within the scope of the proposition stated by Osborn. Nor do the two cases cited by appellant substantiate his contention. The case of Thompson v. Freeman, is more in harmony with appellee's position inasmuch as Appel did have before him the very writings upon which he based his conclusion. These writings were proven writings, admitted in evidence and were available for cross-examination, use by other witnesses or submission to the jury. In addition the writings not introduced in evidence were available in court for what-

ever use or purpose the defendant may have desired.

In the case of **In re Iwer's Estate,** 280 N. W. 579, 586, the court stated:

> We think the trial court was right in ultimately concluding that the objections to the evidence given by Mr. Courtney **based on the memoranda** (not in evidence) should have been sustained. It will be observed that the court struck out not only the inadmissible testimony of the witness but also his opinion that the signature of Iwer's was genuine, although the motion to strike the testimony of the witness as to the signature of Iwer's was based solely on the reasons urged in the prior objections to the use of the memoranda. **The ruling was obviously too favorable to the contestants, but was unchallenged by proponents.** (Emphasis supplied).

It is to be noted in the present case that the witness Appel based his opinion upon proven writings admitted in evidence. Thereafter he gave his reasons for such opinion (R. 153-164). His opinion was not based upon memoranda not in evidence and was illustrated by photographic reproductions of the proven handwriting of Jefferson. These photographic reproductions were also admitted into evidence. (R. 164-167).

In **Steel v. Snyder,** 295 Pa. 120; 144 A. 912, 914, in a case similar to the present case, the court held that the entire testimony of a witness would not be stricken, where the major portion was properly admissible, and only a small portion questioned as inadmissible. In its opinion the court stated:

In addition George W. Wood, a handwriting expert of large experience, studied the signature in question, alone and in connection with others shown to be genuine, and expressed the opinion that the former were forgeries. A motion was made to strike out his evidence for the alleged reason that his opinion was based in part on signatures not in evidence. While his testimony as to that was a little vague, taken as a whole, it was not such as to justify granting the motion. As to this the witness says, inter-alia:

Q. The other signatures you had assisted you in arriving at your opinion? (Those not in evidence).

A. They did not. I would say in a negative way this, in the particulars that they did not contradict the opinion formed from an examination of these signatures themselves.

Q. But in arriving at your opinion, before you had your opinion, you decided you should have other signatures and you did use signatures other than Defendant's Exhibit 1 to help you arrive at your opinion?

A. I would not say to help me because these signatures in question, studied intelligently by any expert, present the earmarks of forgery.

The mere fact that the unidentified signatures did not disprove the conclusion formed from the study of such as were proven certainly did not render the opinion incompetent. Aside from this, the motion was to strike out the entire testimony of the expert, covering 18 printed pages, the major portion of which consisted in a discus-

sion of the disputed signatures by themselves and the intrinsic evidence of forgery they disclose, and other explanations clearly competent, aside from his opinion.

THIRD POINT RAISED: 3. THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL AS TO COUNT 1 OF THE INDICTMENT INASMUCH AS THE INDICTMENT SUFFICIENTLY CHARGED THE CRIME OF FORGERY AND THERE WAS SUFFICIENT PROOF OF INTENT TO DEFRAUD.

Inasmuch as the sufficiency of the indictment has been discussed under the First Point Raised, **supra,** the discussion here will be confined to whether there was sufficient proof of intent to defraud to justify the Court in denying appellant's motion for judgment of acquittal.

Appellant repeatedly asserts there is no proof whatsoever of an intent to defraud anyone. This assertion is not substantiated by the record. While it appears that on a number of occasions appellant did endeavor to recover possession of the check, there is no evidence that he made an effort to reimburse the Northern Commercial Company for the amount that he had obtained from them. It is apparent from the record that appellant's only concern was that of regaining possession of the instrumentality of the crime committed by

him, and his desire to pay the amount of the check was only secondary to the recovery of the check. Appellant realized that, unless he did get the check back into his possession, he would ultimately be charged with the crimes of which he was convicted. Notwithstanding appellant's statement that it would have not been good business for him to have paid the Northern Commercial Company the amount of the check and taken a receipt therefor, it certainly would have negatived any criminal intent. However, the fact that he persistently declined to pay the amount of the check unless the check was redelivered to him, and the fact that he made no effort to pay the check until he learned that a criminal investigation was being made, is strong indication of his intent.

In Vol. 37, C.J.S., Section 100, at page 104, we find the following statement:

> It must be established beyond a reasonable doubt that the accused knew that an instrument was a forgery and that he intended to defraud. Knowledge and intent to defraud may be sufficiently established by circumstantial evidence. The intent to defraud is to be inferred from the deliberate commission of forgery. Thus knowingly passing a forged instrument as genuine is conclusive of an intent to defraud. Evidence that the advantage which the instrument, if genuine, would have given has been obtained, or that the injury which such an instrument could inflict has been accomplished, sufficiently shows an intent to defraud. Signing a fictitious name, or

the impersonation of another, shows guilty intent and justifies a conviction.

In the present case we have direct evidence, the testimony of witness Charles Appel, that appellant forged a fictitious name to the check (R. 135, 163, 164, 193). He then uttered and published this forged check at a business house where he had done business for a number of years and received full value therefor. The amount of money which he obtained from the Northern Commercial Company has apparently not been repaid to this date.

Another significant point for consideration in arriving at appellant's intent is the fact that the amount "Four Hundred Ninety-Six Dollars and Eighty Cents" on the check, plaintiff's exhibit No. 1, appears on the check in typewriting as well as by the impression of the F & E check protector No. 2758148. It is to be noted that this is not true in regard to plaintiff's exhibit 4 and plaintiff's exhibit 5. It may logically be concluded that appellant, in planning what he believed to be a "perfect crime" decided, after he had typed in the words "Four Hundred Ninety-Six Dollars and Eighty Cents", to improve on his masterpiece by passing the check through the check protector at the Townsend Typewriter Shop, which machine was readily accessible to him. This conclusion is supported by the fact that, according to Mr. Jefferson's testimony (R. 247-248), the check was prepared on the morning of February 9th. If the lease had been prepared at that time Wosdon P

Lang would have given the check to Mr. Jefferson and he in turn would have received the lease. There is nothing in the record to indicate that Jefferson was reluctant, or had declined, to accept the check with the amount being merely typewritten thereon. Inasmuch as no objection was made to this check on the morning of the 9th, Wosdon P. Lang, if he existed, would have had no reason whatsoever to have gone to the trouble of going into the City of Anchorage and having the check passed through a check protector. The common ordinary experiences of mankind would lead us to believe that Wosdon P. Lang would not do a thing which, under the circumstances, was unnecessary. However, in considering the background of the appellant, his prior criminal record, and the painstaking care he took to make this the "perfect crime", it seems quite logical that he, to add to the appearance of the authenticity of this check, would be the one who passed it through the F & E check protector No. 2758148.

The Court very carefully instructed the jury on the matter of criminal intent in Instructions 8 and 9 (R. 12-14). Whether or not there existed an intent to defraud was a question for the jury to determine and the Court was, therefore, correct in denying appellant's motion for judgment of acquittal and submitting the case to the jury.

State v Dobbins, 351 Mo. 796; 174 S. W. 2d 171

37 C.J.S., Sec. 105, page 106.

FOURTH POINT RAISED: 4. THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL AS TO COUNT II SINCE THAT COUNT SUFFICIENTLY CHARGED THE CRIME OF UTTERING AND PUBLISHING A FORGED CHECK.

The pertinent part of Count II of the Indictment reads as follows:

> The said Will Key Jefferson * * * then and there having in his possession a check with a false, forged, and counterfeit signature written on the face thereof in the following tenor: (setting forth the check) did with intent to injure and defraud, wilfully, feloniously, knowingly, and unlawfully utter and publish as true and genuine to one Henry Cole, said false, forged and counterfeit signature and check, * * *.

In view of the fact that this count plainly and clearly charges the defendant with wilfully and knowingly uttering and publishing a forged check with intent to injure and defraud, it appears that no argument is necessary. The words wilfully and knowingly are defined in the following cases:

Screws v. U. S., 325 U. S. 101
Spies v. U. S., 317 U. S. 492, 497
U. S. v. Murdock, 290 U. S. 389, 394
Zimberg v U. S., 1 Cir., 142 F. 2d 132, 137
Wilton v. U. S., 9 Cir., 156 F. 2d 433, 434

FIFTH POINT RAISED: 5. THAT THE TRIAL

COURT DID NOT ERR IN GIVING INSTRUCTION 6-A AND THAT THE SAME IS A CORRECT STATEMENT OF THE LAW.

Instruction No. 6-A (R. 12) reads as follows:

> If any person knowingly, wilfully, fraudulently and with criminal intent signs a fictitious name to a check as drawer thereof, that is to say, signs the name of some person not in existence or not known to be in existence, with intent to represent such signature to be true and genuine, and with intent to defraud some other person, the person who so signs the fictitious name is guilty of forgery just as though the name so signed to the check was the name of some living and known person.

The memorandum of exceptions to instructions (R. 31), reads as follows:

> MR. DAVIS: Except to Instruction 6-A; all of No. 7; and to No. 8. That is all of those.

It is urged that the exception to Instruction 6-A be disregarded inasmuch as appellant failed to comply with Rule 30, Federal Rules of Criminal Procedure, which reads in part as follows:

> No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, **stating distinctly** the matter to which he objects and the **grounds of his objection.** (Emphasis supplied.)

Furthermore, this specification should not be con-

sidered by the Court inasmuch as appellant has completely failed to comply with the requirements of Rule 20, section 2, subsection d, Rules of the United States Circuit Court of Appeals for the Ninth Circuit, as amended March 20, 1946.

To constitute the crime of forgery, the name alleged to be forged need not be that of any person in existence. It may be wholly fictitious if the instrument is made with intent to defraud and shows on its face that it has sufficient efficacy to enable it to be used to the injury of another.

Meldrum v. U. S., 9 Cir., 151 F. 177, 181
Buckner v. Hudspeth, 10 Cir., 105 F. 2d 393 395
Milton v. U. S., USCA DC, 110 F 2d 556, 560
37 C.J.S., Sec. 10, p. 39

SIXTH POINT RAISED: 6. THE TRIAL COURT DID NOT ERR IN GIVING INSTRUCTION 7.

Instruction No. 7 (R. 12) reads as follows:

> The fact, if it be a fact, that the defendant offered to refund to the Northern Commercial Company the amount of the check described in the indictment, provided said check were then returned to him, is no such defense to the charges contained in either count of the indictment as to justify acquittal if you find beyond reasonable doubt that the defendant knowingly and wilfully and with intent to defraud, forged the check as charged in the first count of the indictment, or that the defendant knowingly and wilfully and

with intent to defraud, uttered and published said check, as charged in the second count of the indictment.

Inasmuch as the memorandum of exceptions to instructions (R. 30-31) reflects that appellant did not state distinctly the portion of instruction 7 to which he objected, nor did he distinctly state the grounds of his exception, as required by Rule 30, Federal Rules of Criminal Procedure, the same should not now be considered by this Court.

Furthermore, this specification should not be considered by the Court inasmuch as appellant has completely failed to comply with the requirements of Rule 20, section 2, subsection d, Rules of the United States Circuit Court of Appeals for the Ninth Circuit, as amended March 20, 1946.

Instruction 7, when considered with the entire charge of the Court, clearly states the law applicable to the facts of the present case.

Appellant, in his brief (p. 15-16), asserts that it was an uncontroverted fact that appellant attempted to pay the money and redeem the check. A search of the entire record does not substantiate such an assertion. It does substantiate the fact that appellant made frantic efforts to redeem the check but that his attempts to repay the check were only incidental to his recovering possession of the check. The record shows, and the jury apparently so found, that appellant's efforts to regain possession of the check were made to

regain possession of incriminating evidence and not for the purpose of reimbursing the company defrauded, namely, the Northern Commercial Company.

SEVENTH POINT RAISED: 7. THE TRIAL COURT DID NOT ERR IN GIVING INSTRUCTION NO. 8 INASMUCH AS SAME IS A CORRECT STATEMENT OF THE LAW.

Instruction 8 (R. 12-13) reads as follows:

> To constitute the crime charged in either count of the indictment in this case, it is not necessary that the defendant intended to defraud or injure any particular person, whether a natural person, a partnership or a corporation, but it is sufficient to constitute the crime charged in either count if it is established beyond reasonable doubt that the defendant committed the essential facts constituting the offense, and in so doing intended thereby to injure and defraud any person, or some person, either the said Henry Cole, or the Northern Commercial Company, or the People's National Bank of Paducah, Kentucky, or some other person.

Inasmuch as the memorandum of exceptions to instructions (R. 31) reflects that appellant did not state distinctly the portion of Instruction 8 to which he objected, nor did he distinctly state the grounds of his exception, in accordance with Rule 30, Federal Rules of Criminal Procedure, the same should not now be considered by this Court.

Furthermore, this specification should not be con-

sidered by the Court inasmuch as appellant has completely failed to comply with the requirements of Rule 20, section 2, subsection d, Rules of the United States Circuit Court of Appeals for the Ninth Circuit, as amended March 20, 1946.

Where, as in the present case, intent to defraud was alleged generally it is sufficient to show an intent to defraud anyone. In the present case the evidence adequately establishes that the Northern Commercial Company was defrauded of the sum of $496.80. A cursory reading of Section 4861 Compiled Laws of Alaska 1933 readily reveals that the Court's Instruction No. 8 is a correct statement of the law.

> EIGHTH POINT RAISED: 8. THE TRIAL COURT DID NOT ERR IN GIVING INSTRUCTION NO. 3, LINES 10 to 15, SINCE THE SAME IS A CORRECT STATEMENT OF THE LAW.

Instruction No. 3, lines 10 to 15 (which appear as lines 7 to 12 in the record as filed in this Court - R. 7), reads as follows:

> The allegation that defendant did "utter and publish" a certain check alleged to have been forged is supported by any evidence that he offered to pass or deliver said check and did pass and deliver it to some other person as a genuine instrument, declaring ar asserting, directly or indirectly, by words or acts, that the check was good.

Inasmuch as the memorandum of exceptions to in-

structions (R. 30-31) reflects that appellant did not distinctly state the grounds of his exception the same should not now be considered by this Court under the provisions of Rule 30, Federal Rules of Criminal Procedure.

Furthermore, this specification should not be considered by the Court inasmuch as appellant has completely failed to comply with the requirements of Rule 20, section 2, subsection d, Rules of the United States Circuit Court of Appeals for the Ninth Circuit, as amended March 20, 1946.

Instruction No. 3 is a correct statement of the law when considered as a whole and when considered in connection with the entire charge of the Court.

Where, as in the present case, a person knowingly passes a forged instrument as genuine, it is conclusive of his intent to defraud.

> **Jordan v. State,** 127 Ga. 278; 56 S. E. 422
> **Bullington v. State,** 123 Neb. 432; 243 N. W. 273

Since intent is incapable of direct proof, any competent evidence of facts and circumstances indicative of accused's intention is admissible; but circumstances having no probative force as to accused's intent are not admissible. Acts of deception, declarations, and misstatements in connection with the false instrument or the uttering thereof are admissible, as is also evidence of a scheme to defraud. The benefit obtained by accused, the disposition made by accused of pro-

ceeds derived from the uttering of the forged instrument, or the injury occasioned to the person to whom the instrument was passed, may be shown. The uttering of the note charged to be forged is admissible to show the intent with which it was written; but it would seem that the act claimed to be a forgery must in some sense be established before such evidence will be admitted. Accused's indorsement of fictitious paper is also admissible to show his intent to defraud by means of such writing, although the indorsement is not set forth in the indictment.

37 C.J.S., Sec. 87, p. 96

NINTH POINT RAISED: 9. THE TRIAL COURT DID NOT ERR IN GIVING INSTRUCTION 4, LINES 8 TO 12, SINCE THE INSTRUCTION CONSIDERED IN ITS ENTIRETY, AND IN CONNECTION WITH THE REMAINDER OF THE COURT'S CHARGE, IS A CORRECT STATEMENT OF THE LAW.

Instruction No. 4, lines 8 to 12, of the original instructions now on file in the District Court, appears as lines 6 to 9 in the record as filed in this Court (R. 9), and reads as follows:

> Each count of the Indictment charges a separate offense which must be considered and acted upon by itself. To each count the defendant has pleaded not guilty, which plea is a denial of the charge and puts in issue every material allegation thereof.

The memorandum of exceptions to instructions (R. 30) reads, in part, as follows:

> MR. DAVIS: I except to the giving of Instruction * * * No. 4, Lines 8 to 12, inclusive.

Inasmuch as the memorandum of exceptions to instructions (R. 30-31) reflects that appellant did not distinctly state the grounds of his exception the same should not now be considered by this Court under the provisions of Rule 30, Federal Rules of Criminal Procedure.

Lines 13 to 16 inclusive of Instruction No. 4, of the original instructions now on file in the District Court, appear as lines 10 to 13 in the typewritten record now on file in this Court (R. 9), and read as follows:

> It therefore becomes the duty, and it is incumbent upon the Government to prove every material element of the charge contained in each count of the indictment to your satisfaction beyond a reasonable doubt.

Apparently, appellant is now assigning as error lines 13 to 16 inclusive of the original instructions of the Court, which appear as lines 10 to 13 inclusive in the typewritten record (R. 9), to which no exception was taken in the lower Court.

It is urged that this specification should not be considered by the Court inasmuch as appellant has completely failed to comply with the requirements of Rule 20, section 2, subsection d, Rules of the United States Circuit Court of Appeals for the Ninth Circuit, as

amended March 20, 1946.

Furthermore, it is urged that this specification should not now be considered by this Court under the provisions of Rule 30, Federal Rules of Criminal Procedure, which reads in part as follows:

> No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection.

Since no objection was made, or exception taken, to that portion of Instruction No. 4 as given by the trial court which appellant is now apparently assigning as error, and since no prejudice to appellant resulted by the giving of this instruction, this specification of error should not now be considered.

The rule consistently followed by this Court is that an error assigned to a charge will not be considered on review in the absence of an exception.

Fredrick, et al. v. U. S., CCA 9, 163 F. 2d 536 549
Waggoner v. U. S., CCA 9, 113 F. 2d 867, 868
Hargreaves v. U. S., CCA 9, 75 F. 2d 68, 73
Smith v. U. S., CCA 9, 41 F. 2d 215, 216
Kearnes v. U. S., CCA 9, 27 F. 2d 854, 855
Alvarado v. U. S., CCA 9, 9 F. 2d 385, 386
Lee Tung v. U. S., CCA 9, 7 F. 2d 111
Coleman v. U. S., CCA 9, 3 F. 2d 243
Feigin v. U. S., CCA 9, 3 F. 2d 866, 867
Joyce v. U. S., CCA 9, 294 F. 665

Raffour v. U. S., CCA 9, 284 F. 720
Cabiale v. U. S., CCA 9, 276 F. 769
Henry Ching v. U. S., CCA 9, 264 F. 639
Vedin v. U. S., CCA 9, 257 F. 550, 552
Andrews v. U. S., CCA 9, 224 F. 418, 419

In this connection it is significant to note that in the opening statement by appellant, made by Mr. Davis at the trial of the case on December 18, 1946, we find the following statement (R. 52):

> As you already know, Mr. Jefferson is here charged with the crime of forgery, and in the second count in the same indictment he is charged with uttering and publishing that check. Now, as everybody has agreed, the indictment is only a charge; it is not evidence. But it is going to be necessary for the Government here to prove each and every allegation of that indictment, **to your satisfaction,** beyond a reasonable doubt, or you must bring in a verdict of not guilty. (Emphasis supplied.)

Furthermore, the phrase "beyond a reasonable doubt" without any words of modification appears in Court's instructions No. 4 (R. 9), No. 5 (R. 10), No. 6 (R. 11), No. 8 (R. 13), No. 9 (R. 14), No. 12-A (R. 16). Instruction No. 11 (R. 14-15) accurately and explicitly defines the term "reasonable doubt".

In **Wilton v. U. S.,** 156 F. 2d 433, under somewhat similar circumstances, this Court stated as follows:

> * * * Appellant also complains that "the charge amounted to a direction to find the defendant

> guilty if the main facts were **believed** by the jury to be true." The point being that mere belief was sufficient as distinguished from the requirement that the belief must be beyond reasonable doubt. However, the instructions abound in expressions that such belief must be beyond a reasonable doubt.

Inasmuch as the Government is bound to prove each and every allegation of the indictment beyond a reasonable doubt in the absence of a failure of proof it would follow that whether or not such proof was made would be a matter to be determined by the members of the jury.

> TENTH POINT RAISED: 10. THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION FOR CHANGE OF VENUE.

Inasmuch as appellant did not designate that portion of the record pertaining to the motion and counter-motion in connection with the change of venue, it should not now be considered by this Court.

Rule 19, paragraph 6, of the Rules of the United States Circuit Court of Appeals for the Ninth Circuit, reads in part:

> If parts of the record shall be designated by one or both of the parties, or if such parts be distinctly designated by counsel for the respective parties, the Clerk shall print * * * **and the Court will consider nothing but those parts of the record** and the points so stated in the record. (Emphasis supplied.)

Accused in a criminal case has no absolute right to a change of venue. Such right depends on a showing of cause to be made by him, and on compliance with the statutory provisions on the subject. There is a general rule, affirmed by statute in some jurisdictions, that an application for a change of venue is addressed to the sound discretion of the trial court, and in absence of an abuse of discretion, its denial of the application is not error. The discretion required to be exercised is a sound legal discretion, not a mere arbitrary action resting on whim, caprice, or bias, and should be exercised with caution. * * *

22 C.J.S., Sec. 192, pp. 303, 304, 305

In the present case there is no showing that the lower Court abused its discretion in denying appellant's motion for change of venue. As a matter of information for this Court, appellant's motion for a change of venue was supported by 14 affidavits. The countermotion filed by the Government was supported by 33 affidavits reflecting that accused could receive a fair and impartial trial in the Third Division of the Territory of Alaska.

Following the Court's denial of appellant's motion for change of venue, and on December 12, 1946, a stipulation was entered into whereby it was agreed that the case be tried by a special venire, appellant, however, reserving his right to object to the ruling of the trial court in refusing to order a transfer of the place of trial of this cause in the event of an appeal. Forty-

six jurors were examined in obtaining a jury of 12 regular jurors and 2 alternate jurors. Under Section 5318 CLA 1933, subdivision 8, anyone in the employment of the Federal Government is subject to challenge for cause by either the plaintiff or defendant and numerous governmental employees were challenged for cause. No unusual difficulty was encountered in empanelling the jury.

Since appellant elected not to designate the portion of the record pertaining to his motion for change of venue, and since the same is not properly before this Court, it should not now be considered.

Storm v. U. S., 94 U. S. 76
England v. Gebhardt, 112 U. S. 502

ELEVENTH POINT RAISED: 11. THE CONVICTION IS NOT BASED ENTIRELY UPON CIRCUMSTANTIAL EVIDENCE, BUT IS BASED UPON DIRECT EVIDENCE AND STRONG CIRCUMSTANTIAL EVIDENCE.

Direct evidence is evidence which if believed proves the existence of the fact in issue without any inference or presumption.

31 C.J.S. Sec. 2, p. 505

Circumstantial evidence is evidence which, without going directly to prove the existence of a fact, gives rise to a logical inference that such fact does exist.

31 C.J.S. Sec. 161, p. 871

In the present case, witness Appel, testified in substance that in his opinion the check in question, Plaintiff's Exhibit No. 1, was forged by appellant (R. 135, 163, 164, 193). This testimony goes directly to the fact in issue, that is, whether Jefferson did or did not forge the check in question. It would therefore seem that appellant's statement that the conviction in this case rests solely upon circumstantial evidence is inaccurate, and without foundation, both as to the law and as to the facts.

Section 4014 Compiled Laws of Alaska 1933, reads as follows:

> In any proceeding before a court or judicial officer of the Territory of Alaska where the genuineness of the handwriting of any person may be involved, any admitted or proved handwriting of such person shall be competent evidence as **a basis for comparison** by witness or **by the jury,** court or officer conducting such proceeding, **to prove or disprove such genuineness.** (Emphasis supplied.)

Thus we have in this case documentary evidence from which the jury might logically have concluded that appellant forged the signature "Wosdon P. Lang" on Plaintiff's Exhibit 1. If such conclusion was made by the jury after comparing the questioned signature with the proven standards, this alone would have been sufficient evidence to warrant a conviction.

In addition to the direct opinion evidence, and docu-

mentary evidence mentioned above, we find strong circumstantial evidence. Among these circumstances are the appellant's financial condition during this period of time; the fact that he inquired of Fred Lange regarding the names of banks in Paducah, Kentucky, and the fact that the check was forged on one of the banks mentioned by Fred Lange; the fact that the check was written on appellant's typewriter; the fact that appellant had easy access to the check protector which made the impression on plaintiff's Exhibit No. 1; the fact that the amount Four Hundred Ninety Six Dollars and Eighty Cents was typed on the check on a typewriter rented by appellant and afterwards the amount was impressed on the check by the check protector accessible to appellant; and the fact that appellant made no effort to reimburse the Northern Commercial Company, but did make repeated offers to pay the amount of the check always upon the condition that the check be returned to him before he would make payment.

CONCLUSION

I

The indictment states facts sufficient to charge the crime of forgery and the crime of uttering and publishing a forged check.

II

The Court did not err in denying appellant's motion to strike the testimony of the government's expert witness Appel.

III

The Court did not err in denying appallant's motion for a judgment of acquittal.

IV

The trial court's instructions, when considered as a whole, correctly stated the law of the case, and were fair to the defense.

V

The Court did not abuse its discretion in denying appellant's motion for a change of venue.

VI

The conviction is based on direct evidence and strong circumstantial evidence.

There appears to have been no error, prejudicial or otherwise, in the trial of the case, and no grounds for a reversal of the judgment. The appellant was given a fair and impartial trial, and was found guilty of the crimes charged by a jury of his peers under proper instructions and upon competent and sufficient evidence. No reason exists for upsetting the verdict of the jury, and the judgment of conviction should be affirmed.

Dated, Anchorage, Alaska, October 29, 1948.

Respectfully submitted,

RAYMOND E. PLUMMER,
United States Attorney,
Anchorage, Alaska
Attorney for Appellee.